IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 402 of 1998

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR.K.G.BALAKRISHNAN
and
Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 6 : No

NEELABEN ASHWINBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR AJ PATEL for Petitioners
Mr.S.N. Shelat, Additional AG, with Mr. S.R. Divetia, AGP, for Respondent No. 1, 2, 5 and 6
MR RM CHHAYA for Respondent No. 3
NOTICE SERVED BY DS for Respondent No. 4

CORAM : CHIEF JUSTICE MR.K.G.BALAKRISHNAN and
MR.JUSTICE M.H.KADRI

Date of decision: 29/09/98

C.A.V. Judgment: (Per: Kadri, J.)

1. Rule. Service of Rule is waived by Mr.S.R.Divetia, Assistant Government Pleader, on behalf of respondents Nos. 1, 2 5 and 6 and Mr.R.M. Chhaya, learned advocate, on behalf of respondent No.3.

2. The petitioners, by filing this petition under Article 226 of the Constitution of India, have prayed for following reliefs:

"(A) The Honourable Court may be pleased to issue a writ of certiorari or any other appropriate writ, order or direction quashing and setting aside the impugned Resolution at Annexure M, R & S hereto; and consequently directing the concerned respondents not to disturb possession of the petitioners and permit them to develop in accordance with the relevant provisions of the Act land bearing Final Plot No.676, 677, 678 of Town Planning Scheme No.28 of Nava Wadaj;

(B) The Honourable Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction declaring section 71 of the Act to be ultra vires Articles 14 19 and 300A of the Constitution of India and consequently striking down the same from the Statute;

(C) The Honourable Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction declaring that the impugned action on the part of the concerned respondents in undertaking variation of Town Planning Scheme No.28 of Nava

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on the part of the concerned respondents and is illegal, null and void.

The brief facts leading to filing of the petition be summarized as under:

3. The petitioners are owners of original plots Nos.177, 178, and 179 of village Wadaj, Taluka: City, District: Ahmedabad. The respondent No.3-Ahmedabad

Municipal Corporation ("AMC" for short), prepared a town planning scheme No.28, in which the lands of the petitioners were included. The said scheme was prepared by resolution No.638 dated 17.9.1968. The said draft town planning scheme was approved by the State Government on 8.1.1979. The said scheme framed by the AMC claimed to be notified on 12.10.1989 and was implemented with effect from 27.1.1981 and it became final on 5.4.1982.

4. As per the say of the petitioners, the lands of plots Nos.177, 178 and 179 of town planning scheme No.28 were abutting the jail road and were vested in the AMC for construction of "Chimanbhai Patel Overbridge". The petitioners were allotted final plots Nos.676, 677, and 678, admeasuring 1103, 979, and 998 respectively, under the said town planning scheme. The petitioners contended that, as per the provisions of Sections 68 and 69 of the Gujarat Town Planning and Urban Development Act, 1976 ("Act" for short), the respondents were under obligation to hand over the possession of the aforesaid final plots to the petitioners immediately, after the possession of the original plots nos. 177, 178 and 179 was taken away from the petitioners. According to the petitioners, they were deprived of the possession of final plots Nos. 676, 677 and 678, and they had to move from pillar to post and one officer to another and from one department to another and, even after the period of 14 years, they were not handed over possession of said final plots. It appears from the record of the petition that several representations and correspondence had taken place between the petitioners, AMC, Jail Authorities of Sabarmati Central Prison, Ahmedabad, and the Home Department of Gujarat State.

5. The petitioners filed Special Civil Application No.5366 of 1995 in this High Court, as they did not get possession final plots Nos. 676, 677 and 678. In the said Special Civil Application, by way of ex-parte ad-interim relief, the authorities were directed to hand over possession of final plots Nos. 676, 677 and 678 to the petitioners. Against the grant of ex-parte ad-interim relief, the respondents filed Letters Patent Appeal No.435 of 1995 which ultimately came to be dismissed by this High Court. It is averred that, during pendency of the Letters Patent Appeal, a suggestion was made by the High Court to find out an amicable solution. Since the petitioners were offered land of dumping ground and over a part of which high tension grid is passing and on which construction, in law, is prohibited, the said suggestion was not acceptable to the petitioners and the talks of settlement had failed. After dismissal of

Letters Patent Appeal, the petitioners had filed an undertaking to the effect that they will not develop or deal with the lands in question for a period of one year from the date of the undertaking. The concerned respondents filed Civil Misc. Application No.2252 of 1996 for extension of period of one year. It is alleged by the petitioners that extension sought for by the authorities was to harass the petitioners and the authorities were acting with vengeance just to deprive the petitioners of the land. It is the say of the petitioners that inter-departmental correspondence had taken place with mala fide intention to deprive the petitioners of possession of the final plots in question as a result of which Misc. Civil Application No.2252 of 1996 was filed.

6. To the utter surprise of the petitioners, a public notice appeared in the daily newspaper, Gujarat Samachar, on 17.12.1996, to vary the town planning scheme, which had become final on 4.5.1982. Due to the public notice to vary the scheme, the petitioners filed Civil Application No.33 of 1997 in Special Civil Application No.5366 of 1995, for amendment. At the time of hearing of the said application for amendment, the concerned respondents contended that the variation was at a formative stage and, before it could be finalised, the petitioners would be afforded an opportunity of being heard.

7. Special Civil Application No.5366 of 1995 came up for hearing before the Court (Coram: Rajesh Balia, J) and the Court, by order dated 1.4.1997, held that the action of variation of the town planning scheme undertaken by the concerned respondent would constitute a fresh cause of action for which relief could be claimed independently. After the above petition was disposed of, the petitioners have filed this petition for the prayers as quoted above.

8. In between, the petitioners made written representation on 25.4.1997 to the Town Development Officer of AMC. On 5.5.1997, another representation was made to the concerned Authority. It is contended that, in spite of representations made by the petitioners, the respondents have now decided to proceed further with variation of town planning scheme qua the lands of the petitioners only. As per the say of the petitioners, the AMC passed resolution bearing No. 26/97-98, dated 15.10.1997, whereby, the Municipal Commissioner is authorised to approve the draft of the varied Town Planning Scheme and to publish the same in accordance

with Rule 18 of the Gujarat Town Planning and Urban Development Rules, 1979, ("Rules" for short) in anticipation of the approval of the Municipal Corporation. According to the petitioners, if the respondents are permitted to proceed with variation of scheme and if the variation is made, such variation would have legislative colour and effect under Section 65 of the Act. It is contended that such variation would not be amenable to challenge by the petitioners at that stage.

9. On behalf of respondent No.2, affidavit in reply of Shri A.M. Desai, Under Secretary, Home Department, is filed. It is not disputed that the petitioners were allotted final plots Nos. 676, 677 and 678 against plots Nos.177, 178 and 179 after coming into force of the town planning scheme No.28. It is also admitted that the said town planning scheme had become final on 4.5.1982. However, it is stated that the Home Department of the State Government had passed resolution on 6.12.1994 directing the concerned authorities to hand over the possession of final plots Nos. 676, 677 and 678, but the actual possession was not given till Special Civil Application No.5366 of 1995 was filed by the petitioners in this High Court. It is stated that, as per the order of the Division Bench of this Court in Letters Patent Appeal No.435 of 1995, after the petitioners filed undertaking on 2.1.1996, possession of final plots Nos. 676, 677 and 678 of town planning scheme No.28 was handed over to the petitioners on 29.1.1996. It is stated that the possession of final plots in question was not handed over to the petitioners because the lands comprising of these final plots were vitally needed by the Sabarmati Central Jail as the same were the lands forming part of the Central Jail Campus, and no private individuals should have access to these lands. In view of this background, the procedure for variation of scheme No.28 had started and a public notice was issued in the daily newspaper. It is stated that the AMC has published another notification in Part-II, Extraordinary Gujarat Government Gazettee, vide No.TPS/NEJ/70 on 7.1.1998, showing the varied draft scheme and pointing out that this draft scheme is kept open for public inspection. It is submitted that scheme No.28 of new Wadaj is varied under Section 78 of the Act, and, as per the provisions of Section 71 of the Act, the scheme may at any time be varied by a subsequent scheme, and the action of the appropriate authority is legal and valid. It is denied that the action to vary the scheme is mala fide to deprive the petitioners of their lands. It is submitted that final plots Nos. 676, 677 and 678 form a part of

the Sabarmati Central Jail Campus and, therefore, the said lands cannot be given to any individual for security reasons of Sabarmati Central Jail, as the said plots are situated within the radius of 150 mtrs. of the open jail where the reformed prisoners are kept.

10. The Deputy Commissioner of Ahmedabad Municipal Corporation has filed affidavit in reply on behalf of respondent No. 3, inter alia, contending that the lands of final plots in question are integral part of the Sabarmati Central Prison, and, from the security point of view, it is eminently necessary to see that the lands in question remained part and parcel of the Central Prison. It is stated that on 29.1.1996 the petitioners were handed over possession of the final plots as per the order passed by the High Court in Letters Patent Appeal No.435 of 1995. It is submitted that the proposal to vary the scheme was made especially by the jail authorities with the request to allot the lands in question to the Central Prison, Sabarmati. The said proposal was examined by the Commissioner of AMC and a tentative decision was taken to place the proposal before the Town Planning Committee as well as the General Board of the AMC. Accordingly, on September 6, 1996, the Commissioner prepared a proposal and asked the Secretary of the AMC to place the said proposal for approving variation of the Scheme No.28 (Nava Vadaj) and also to consult the Town Planner, Gujarat State, before making and declaring intention as contemplated under Section 41(1) of the Act. The proposal of the Commissioner was placed before the Town Planning Committee and the same was approved vide Resolution No.72 in its meeting held on September 26, 1996. After approval of the proposal by the Town Planing Committee, the proposal for the said variation was made to the Chief Town Planner by communication dated October 22, 1996. The said proposal of the Commissioner was examined by the Chief Town Planner, Gujarat State, who gave tentative approval to the said proposal of variation vide communication dated October 24, 1996. The said proposal was also placed before the General Board of the AMC which came to be sanctioned vide Resolution No.691 in its meeting held on November 26, 1996. It is stated that the Municipal Commissioner on getting such approval prepared a detailed proposal including maps and requested the Secretary of the Corporation vide communication dated October 30, 1996 to place the said proposal before the Town Planning Committee of the Corporation for making a declaration of intention to vary the said scheme as contemplated under Section 41(2) of the Act. It is stated that the said proposal was placed before the Town Planing Committee in

its meeting held on December 11, 1996 and after considering the said proposal Town Planning Committee vide its resolution No.96 declared the intention to prepare and publish the second varied town planning scheme No.28 as contemplated under Section 41(2) of the Act. It is stated that the said proposal was also approved by the General Board of AMC by its resolution No.864 in its meeting held on January 24, 1997. After following the procedure under the Act and the Rules framed thereunder, the Town Planing Committee of the AMC vide its resolution No.16, dated January 30, 1997, authorised the Commissioner to conduct the proceedings of inviting suggestions and objections from the owners and affected parties. It is stated that individual notices were served upon the owners of the lands included in the scheme, inviting objections and suggestions as well as to give them an opportunity to examine the proposals of the varied scheme themselves in the meeting which was to be held on April 25, 1997. Public notices were given in "Sandesh" and "Prabhat", daily newspapers, on April 20, 1997, inviting suggestions and objections from all concerned and further informing all the concerned about the meeting of April 25, 1997. It is stated that, after considering the said suggestions and objections, the Town Planning Committee of AMC vide its resolution No. 26, dated October 15, 1997, proposed to publish the draft town planning scheme (second varied Nava Vadaj) as contemplated under Section 41(2) of the Act read with Rule 18 of the Rules. The said resolution of the Town Planning Committee was also approved by the General Body of the AMC vide Resolution No.855, dated November 20, 1997. Accordingly, the draft town planning scheme No.28 (Nava Vadaj-second varied) has been duly published under Section 42(2) of the Act in the Government Gazettee dated January 7,1998. It is submitted that the AMC has scrupulously followed the procedure as prescribed under the Act and the Rules and, therefore, the averments made in the petition are baseless. It is further submitted that the resolution to vary the scheme has been passed on the basis of the need and exigencies by following the procedure of the Act and the Rules. It is submitted that the Corporation is the Appropriate Authority under the Act and, therefore, after declaring the intention to prepare the scheme, it has to follow the procedure as laid down under the Act and the Rules. It is submitted that as per the provisions of Section 28 of the Act, the draft town planing scheme so prepared by the AMC is to be submitted to the State Government for its sanction. It is submitted that the present petition is premature inasmuch as that still the town planning scheme is at the stage of draft town planning scheme and even the said

draft town planning scheme is to be approved and sanctioned by the State Government. It is submitted that, after the draft town planning scheme is sanctioned by the State Government, the Town Planning Officer, as contemplated under Section 50 of the Act, shall be appointed and the petitioners would be heard by the Town Planning Officer as provided under Section 52 of the Act read with Rule 26 of the Rules. Therefore, it is submitted that the petitioners will have a right to be heard even by the State Government if any objections are raised by the petitioners before the scheme is sanctioned under Section 65 of the Act. It is stated that the scheme is at its primary and primitive stage and, therefore, the present petition is premature. It is denied t.R

fide purpose as alleged by the petitioners. It is denied that the proposed scheme is ultra vires Articles 14, 19 and 300-A of the Constitution of India. Lastly, it is submitted that the powers delegated under Section 71 of the Act have been legally and lawfully exercised by the Corporation.

11. Mr. A.J. Patel, learned counsel for the petitioners has raised the following contentions against variation of town planning scheme No.28.

(i) The provisions of Section 71 of the Act are ultra vires Articles 14, 19 and 300-A of the Constitution of India, as the Town Planning Scheme is sought to be varied at the behest of the Government, with the sole purpose of taking away the lands of the petitioners.

(ii) The AMC has R

become final as far as back as in 1982.

(iii) The AMC has varied the scheme for the benefit of the State Government in mala fide exercise of power. If the lands are required for the Jail Complex, the same can be acquired under the provisions of the Land Acquisition Act and, therefore also, variance at the instance of the Government amounts to arbitrary and colourable exercise of power.

12. On behalf of the respondents, Mr. S.N. Shelat, learned Additional Advocate General, has argued that the appropriate authority, i.e., AMC, has power to vary the scheme under Section 71 of the Act. As the land of final plots Nos. 676, 677, and 678 are situated adjacent to the jail complex, there is danger to the security of the open jail, where reformed prisoners are lodged. It is

submitted that Section 71 of the Act is not ultra vires Articles 14, 19 and 300-A of the Constitution of India and the said Section was already held to be intra-vires by the judgment of the Division Bench of this Court in the case of Bhupendrakumar Ramanlal Shah vs. State of Gujarat. reported in 1995 (2) GLR 1721. It is argued that originally the land in question belonged to the jail authority and while varying the scheme the lands are reallotted to the said authority. The learned Additional Advocate General has further submitted that the petitioners are allotted land of final plot No.683 in the same area situated on the main road. It is further submitted that the appropriate authority has scrupulously followed the procedure as provided under the Act to vary the scheme. It is, lastly, submitted that the petition is premature as the varied draft scheme is at the primitive stage and, therefore, the petition deserves to be rejected.

13. In making a town planning scheme under the Act, the lands of all persons covered by the scheme are treated as if they are put in a pool. The Town Planning Officer then proceeds to reconstitute the plots for residential buildings and to reserve lands for public purposes. Reconstituted plots are allotted to the landholder. The reconstituted plots having regard to the exigencies of the scheme need not be of the same dimensions as the original land. Their shape and size may be altered and even the site of the reconstituted plot allotted to an owner may be shifted. The Town Planing Officer may lay out new roads, divert or close existing roads, reserve lands for recreation grounds, schools, markets, green belts and similar public purposes, and provide for drainage, lighting, water-supply, filling up or reclamation of low-lying, swamp or unhealthy areas or levelling up of land so that the total area included in the scheme may conduce to the health and well-being of the residents. Since the town planning scheme is intended to improve the sanitary conditions prevailing in a locality, the owners of plots are required to maintain land open around their buildings. The object of the scheme being to provide amenities for the benefit of the residents generally, the area in the occupation of the individual holders of land is generally reduced, for they have to contribute out of their plots, areas which are required for maintaining the services beneficial to the community.

14. The re-arrangement of titles in the various plots and reservation of land for public purposes require financial adjustments to be made. The owner who is

deprived of his land has to be compensated, and the owner who obtains a re-constituted plot in surroundings which are conducive to better sanitary living conditions has to contribute towards the expenses of the scheme. This is because on the making of a town planning scheme, the value of the plot rises and a part of the benefit which arises out of the unearned rise in prices is directed to be contributed towards financing of the scheme which enables the residents in that area to more amenities, better facilities, and healthier living conditions. The provisions relating to payment of compensation and recovery of contribution are vital to the successful implementation of the scheme. The owner of the reconstituted plot who gets the benefit of the scheme must make contribution towards the expenses of the scheme. The owner who loses his property must similarly be compensated. For the purpose of determining the compensation, the Legislature has adopted the basis of market value of the land expropriated, but the land is valued not on the date of extinction of the owner's interest, but on the date of the declaration of intention to make the scheme.

15. The provisions of the Bombay Town Planning Act, 1954 are similar to the provisions of the Gujarat Town Planning & Urban Development Act, 1976. Section 56 of the Bombay Act is in pari-materia with Section 70 of the Gujarat Act. Both the sections deal with power to vary scheme on ground of error, irregularity or informality. Section 57 of the Bombay Act is with regard to power to vary or revoke town planning scheme. The corresponding provision in the Gujarat Act is Section 71.

Section 57 of the Bombay Act	Section 71 of the Gujarat Act
Notwithstanding anything contained in section 56 a town planning scheme may at any time be varied or revoked by a subse- quent scheme made, published and sanc- tioned in accordan- ce with the Act.	Notwithstanding anything contained in section 70, a town planning scheme may at any time be varied, a subsequent scheme made, published and sanctioned in accordance with the provisions of the Act.
(2) The State Government (i) on the application of the local authority, or	

(ii) of its own motion, after making such inquiry as it deems fit and after giving the local authority an opportunity to be heard, may at any time by notification in the Official Gazette, revoke a town planning scheme, if it is satisfied that under the special circumstances of the case the scheme should be so revoked.

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16. Before the Supreme Court, in the case of Maneklal Chhotalal and others vs. M.G. Makwana and others, reported in AIR 1967 Supreme Court, 1373, constitutional validity of the Bombay Town Planning Act, 1954, was challenged on the ground that certain provisions of the said Act infringe the fundamental rights under Articles 14 and 19 of the Constitution of India. The Supreme Court, after considering the object and various provisions of the said Act, held, in paragraphs 46 and 47, as under:

"The principles to be borne in mind in applying Arts. 14 and 19 of the Constitution are now well settled. A fundamental right to acquire, hold and dipsoe of property, can be controlled by the State only by making a law imposing, in the interest of the general public, reasonable restrictions on the exercise of the said right. Such restrictions on the exercie of a fundamental right shall not be arbitrary, or excessive, or beyond what is required in the interest of the general public. The reasonableness of a restriction shall be tested both from the substantive and procedural aspects. If an uncontrolled or unguided power is conferred, without any reasonable and proper standards or limits being laid down in the enactment, the statute may be challenged as discriminatory. Bearing these principles in mind, the question is whether the grievance of the petitioners in this regard, is well founded. No doubt, it is seen that the petitioners, as stated earlier, have been allotted, under the Scheme, a smaller extent of land and they have also been directed to pay certain amounts as their share of contribution. But, having due regard to the scheme of the Act and the object sought to be achieved, such results are inevitable. At every stage, from the

beginning to the end, we have already indicated, the Act and the Rules, make very elaborate provisions regarding the formalities to be gone through, by the local authority, by the State Government and by the other authorities concerned, in the matter of preparing and finalising a Town Planning Scheme. At all stages, a very wide publicity is given, by the authorities concerned, in the matter of making known its proposals to the public and to the owners of the land, who are sought to be affected by the Scheme. Provisions have been made for filing of objections and suggestions and the authorities being bound to take into account those objections and suggestions. The procedure to be adopted by the Town Planning Officer, in the matter of giving his decisions, on the various aspects referred to in S.32, have been not only indicated, in that section, but also provided for, under the Rules.

It is also seen, from the affidavit of the petitioners themselves, that at all relevant stages, they have filed objections or suggestions before the appropriate authority. Nor are we impressed with the contention advanced on behalf of the petitioners that there has been unfettered and arbitrary power vested in the Town Planning Officer in the matter of deciding the various points coveved by S.32 of the Act. We have already indicated that the procedure, to be adopted by the Town Planning Officer has been dealt with elaborately, by the relevant rules."

17. A contention came to be raised in Special Civil Application No.1876 of 1988 in this High Court that, once town planning scheme is finalised under the provisions of sub-section (3) of Section 55, no amendment can be made by the Executive and it is only by legislative action that any change can be brought about. The above contention was negatived by the Division Bench of this Court and it was held that Section 71 of the Act clearly provides that a town planning scheme at any time may be varied by a subsequent scheme to be made, published and sanctioned in accordance with the provisions of the Act. It was held that the Act gives specific powers under Section 71 to vary the same by a subsequent scheme. What Section 71, therefore, provides is that the procedure laid down in the Act for making a town planning scheme will have to be followed for the purpose of varying a sanctioned scheme. (See: 1995(2) GLR 1721: Bhupendrakumar Ramanlal Shah vs. State of Gujarat.) In the case of Bhupendrakumar Ramanlal Shah (supra), it was also contended that Section 71 of the Act was ultra vires

Articles 245 and 246 of the Constitution of India. Dealing with the above contention, the High Court, in paragraph 13, held as under:

"Before concluding we may take note of the judgment of the Supreme Court in the case of Maneklal Chhotalal & Others vs. M.G. Makwana & Others, reported in 1967 SC 1373. In that case, the challenge was to the various provisions of the Bombay Town Planning Act, 1954, which are undoubtedly in pari materia with the present Act. The challenge before the Supreme Court was to the validity of the said Act and its provisions with reference to Articles 14 and 19 of the Constitution of India. The validity of the said act was upheld and the Supreme Court observed in paragraph 53 that, "the Act as a whole will have to be sustained." The provisions of Sec.56 of the Bombay Town Planning Act is similar to Sec.70 and the provisions of Sec.57 of the Bombay Town Planning Act is similar to Sec.71 and Sec.51(3) is similar to Sec.65(3). It is true that there was no challenge in that case with reference to the Legislature's competence but in our opinion there is no force in that contention."

18. The observations of the Division Bench of this Court in Bhupendrakumar Ramanlal Shah (supra) will apply in all fours to the facts of the present case. As stated earlier, the provisions of the Bombay Act and the Gujarat Act are in pari-materia. The Apex Court has upheld the validity of the Bombay Town Planning Act, 1954. As stated in the affidavit in reply, the appropriate authority has followed scrupulously the provisions of Sections 41, 48 and 71 of the Act while proposing variance in the town planning scheme No.28. The provisions contained in Section 71 are in a sense analogous to the provisions of Section 21 of the General Clauses Act. A scheme is brought into operation by issuing a notification and Section 21 enables an authority to amend, vary or rescind any notification, order etc. in the manner in which and subject to such conditions in which the original power was exercised. This is exactly what is provided by Section 71 of the Act. In our opinion, challenge to vires of Section 71 against the breach of Articles 14, 19 and 300-A of the Constitution of India, is concluded by the decision of this Court in the case of Bhupendrakumar Ramanlal Shah (supra) [1995(2) GLR 1721] and the decision of the Apex Court in the case of Maneklal Chhotalal and others vs. M.G. Makwana and others, (supra) [AIR 1967 Supreme Court 1373]. Therefore, we do not find any substance in

submission of the learned counsel for the petitioners that Section 71 is ultra vires Articles 14, 19 and 300-A of the Constitution of India.

19. The provisions of the Act can only be struck down if it is found to be arbitrary or unreasonable. No enactment be struck down by saying that it is arbitrary or unreasonable or it offends Article 14 or 19 or 300-A of the Constitution of India. Some or other constitutional infirmity is to be found out before invalidating the statutory provisions. The enactment cannot be struck down on the ground that the Court thinks it unjustified. When there is a question of security of Central Prison, Sabarmati, and when the Jail Authorities have represented before the State Government and the appropriate authority that looking to the security measures the lands of final plots Nos. 676, 677 and 678 cannot be handed over to the petitioners, it cannot be said that the power to vary a scheme is exercised with mala fide intention to deprive the petitioners of their right to property. The appropriate authority has already decided that, on variance of the scheme, in stead of final plots Nos. 676, 677 and 678, the land of final plot No.683 would be allotted to the petitioners. Therefore, in our opinion, the decision to vary town planning scheme No.28 is not in mala fide exercise of power and it cannot be struck down on that ground also.

20. The contention of the learned counsel for the petitioners that the appropriate authority has no power to vary the scheme which has become final way back in the year 1982 and, therefore, the impugned resolution of the Town Planning Committee, being No.26/97-98, dated 15.10.1997, is illegal and mala fide, in our opinion, does not deserve merit, and requires to be rejected. As noticed earlier, the appropriate authority, by virtue of provisions of Section 71 of the Act, has power to vary a town planning scheme and to submit a subsequent scheme. The only thing, which is required to be done, is that the appropriate authority has to follow the procedure prescribed under the Act. The affidavits filed by the respondents Nos.2 and 3 indicate that the prescribed procedure is followed by the authorities in varying the scheme. The contention that, once the scheme is finalised, it cannot be varied, also requires to be rejected. In the case of State of Maharashtra vs. Mahadeo Deoman Rai alias Kalal & Others, reported in JT 1990 (3) SC 48, the Apex Court has ruled as under:

"A particular scheme may serve the public purpose at a

given point of time but due to change of circumstances it may become essential to modify or substitute it by another scheme. The requirements of the community do not remain static; they indeed go on varying with the evolving process of social life. Accordingly, there must be creative response from the public authority and the public scheme must be varied to meet the changing needs of the public. At the best for the respondent, it can be assumed that in 1967 when the resolution in his favour was passed, the acquisition of the land was not so urgently essential so as to call for his dispossession. But for that reason it cannot be held that the plots became immune from being utilised for any other public purpose for ever. The State or a body like the municipal Council entrusted with a public duty to look after the requirements of the community has to assess the situation from time to time and take necessary decision periodically."

21. It is contended by the learned counsel for the petitioners that the appropriate authority has varied the scheme for the benefit of the Government, as the lands in question are needed for the security purpose of the jail authorities. It is further contended that the appropriate authority or the Government should have acquired the lands under the provisions of the Land Acquisition Act, rather than varying the scheme and, therefore, the decision to vary the scheme is in colourable exercise of power, which smacks of mala fides. In our considered view, the submission of the learned counsel for the petitioners deserves to be rejected. The lands of final plots Nos. 676, 677 and 678 originally belonged to the Central Prison, Sabarmati. Adjacent to the above-stated final plots, there is open jail wherein reformed prisoners are kept. The jail authorities have, time and again, represented before the appropriate authority and the Government against the allotment of the land of the Central Prison, Sabarmati, to the petitioners. In the correspondence, the jail authorities had categorically stated that, if residential complex is permitted to be developed in the said final plots, it would be hazardous to the security of the jail complex. Further, the Gujarat Town Planning Act and the Land Acquisition Act are two separate provisions, one for acquisition by the State Government and the other in which the statutory vesting of land operates as acquisition for the purpose of town planning by the local authority. The State Government can acquire the land under the Land Acquisition Act and the local authority only under the Gujarat Town Planning Act. There is no

option to the local authority to resort to one or the other of the alternative methods which result in acquisition. Once the draft town planning scheme is sanctioned, the land becomes subject to the provisions of the Town Planning Act, and on the final town planning scheme being sanctioned, by statutory operation the title of the various owners is readjusted and the lands needed for a public purpose vest in the local authority. Land required for any of the purposes of a town planning scheme cannot be acquired otherwise than under the Act, for it is a settled rule of interpretation of statutes that when power is given under a statute to do a certain thing in a certain way the thing must be done in that way or not at all. (See: Taylor v. Taylor, (1875) I. Ch.D.426). Again, it cannot be said that because it is possible for the State, if so minded, to acquire land for a public purpose of a local authority, the statutory effect given to a town planning scheme results in discrimination between persons similarly circumstanced. In the Town Planning Act also, provisions are made for compensation to the land owners after readjustment of their plots and separate provisions are provided for determination of compensation. Therefore, we do not see any merit in the submission the learned counsel for the petitioners that the decision of the respondent-Corporation to vary the scheme is mala fide and in colourable exercise of power.

22. The learned counsel for the petitioners relied upon the decision of the Supreme Court in case of Prakash Amichand Shah vs. State of Gujarat, reported in AIR 1986 Supreme Court 468. In the above case, contention was raised that it was possible to acquire the land of the appellant either under the Land Acquisition Act, 1894 which is more favourable to the owner of the land both from the point of view of the procedural safeguards and from the point of view of the quantum of compensation payable for the land which includes solatium payable under section 23(2) thereof than the Act which does not provide for appeals against many of the orders passed by the Town Planning Officer under section 32 of the Act and does not authorise payment of solatium in addition to the market value of the land, the acquisition of the land under the Act is discriminatory and violative of Article 14 of the Constitution which guarantees equality before law and equal protection of the laws. The Apex Court, while dealing with the above contention, followed its earlier decision in the case Zandu Pharmaceutical Works Ltd. vs. G.J. Desai, reported in 1969 UJ (SC) 575, and held that this question is no longer res-integra. The Apex Court, with approval, has quoted the following

observations made in Zandu Pharmaceuticals Works Ltd in paragraph 18:

"When the Town Planning Scheme comes into operation the land needed by a local authority vests by virtue of S.53(a) and that vesting for purposes of the guarantee under Art.31(2) is deemed compulsory acquisition for a public purpose. To lands which are subject to the scheme, the provisions of Ss.53 and 67 apply, and the compensation is determined only in the manner prescribed by the Act. There are therefore two separate provisions one for acquisition by the State Government and the other in which the statutory vesting of land operates as a acquisition for the purpose of town planning by the local authority. The State Government can acquire the land under the Land Acquisition Act, and the local authority only under the Bombay Town Planing Act. There is no option to the local authority to resort to one or the other of the alternative methods which result in acquisition. Hence the provisions of Ss. 53 and 67 are not invalid on the ground that they deny equal protection of the laws or equality before the laws."

After quoting the above observations of the earlier decision, in paragraph 19, the Supreme Court has ruled as under:

"19. In order to appreciate the contentions of the appellant it is necessary to look at the object of the legislation in question as a whole. The object of the Act is not just acquiring a bit of land here or a bit of land there for some public purpose. It consists of several activities which have as their ultimate object the orderly development of an urban area. It envisages the preparation of a development plan, allocation of land for various private and public uses, preparation of a Town Planning Scheme and making provisions for future development of the area in question. The various aspects of a Town Planning Scheme have already been set out. On the final Town Planning Scheme coming into force under section 53 of the Act, there is an automatic vesting of all lands required by the local authority. It is not a case where the provisions of the Land Acquisition Act, 1894, have to be set in motion either by the Collector or by the Government."

23. The decisions relied on by learned counsel for the petitioners reported in AIR 1971 Supreme Court 1228 (State of Punjab vs. Ramji Lal and others), AIR 1984

Supreme Court 1707 (Jiwani Kumar Paraki vs. First Land Acquisition Collector, Calcutta), and AIR 1989 Supreme Court 997 (State of U.P. vs. Dharmander Prasad Singh), were decided in the facts of that particular case and the same have no bearing to the facts of the present case and, therefore, we think it fit not to discuss further any of the judgments cited by the learned counsel for the petitioners.

24. It is also contended by the learned counsel for the petitioners that the Home Department, vide its resolution dated 7.10.1994, had ordered that possession of final plot Nos. 676, 677 and 678 be handed over to the private owners in accordance with law. The learned counsel for the petitioner has also submitted that, as per the decision of the Division Bench of this Court, in Letters Patent Appeal No.435 of 1995, dated 19.12.1995, the petitioners were ordered to be put in possession on certain terms and conditions, and to refute the order of the Home Department and the order of this Court, the decision is taken to vary the scheme which clearly shows mala fide exercise of power. It is further contended that where mala fides are alleged, it is necessary that the person against whom such allegations are made should come forward with an answer refuting or denying such allegations or otherwise the said allegations remain unrebutted and the Court would in such case be constrained to accept the allegations so remained unrebutted and unanswered on the test of probability. In support of this contention, the learned counsel for the petitioners has placed reliance on the decision of the Supreme Court in the case of Express Newspapers Pvt Ltd vs. Union of India, reported in AIR 1986 Supreme Court 872. In our opinion, the power exercised under Section 71 of the Act cannot be said to be mala fide or with oblique motives to refute the order of the High Court in Letters Patent Appeal No.435 of 1994. The petitioners were put in possession of the final plots in question on the condition that they filed an undertaking not to develop the land in question for a particular time as it was contemplated by the appropriate authority to vary the scheme as allotment of final plots Nos. 676, 677 and 678 were made to the petitioners ignoring the security measures of the jail complex which was adjacent to the lands in question. It would not be out of place to mention here that, in lieu of final plots Nos. 676, 677 and 678, the petitioners are to be allotted as per the varied scheme the land of final plot No.683 situated just opposite to the land in question, as shown in the map annexed with the petition. Further, the order of the

Division Bench of this Court in Letters Patent Appeal No.435 of 1995 had arisen out of the ad-interim relief granted pending Special Civil Application No.5366/95. Therefore, it cannot be said that the said order was the final adjudication of the rights of the petitioners to hold possession of the final plots in dispute. The said order was passed as an interim arrangement pending decision of Special Civil Application No.5366/95. Therefore, in our view, the submission of the learned counsel for the petitioners that decision to vary the scheme is an attempt to refute the order of the High Court in Letters Patent Appeal No.435 of 1994 has no merit. We do not find any force in the submission of the learned counsel for the petitioners that the allegation of mala fides having not been denied by the respondents should be accepted and it should be held that there is mala fide intention on the part of the respondents to vary the scheme. The allegations of mala fides are specifically denied in the affidavits filed by the Home Department and the AMC. The lands in question originally formed part of the jail complex, and, on coming into force the town planning scheme no.28, the said lands were allotted to the petitioners ignoring the security measures of the Central Jail. When the question of security of jail complex came to the knowledge of the appropriate authority and the Government, it was decided to vary the scheme. Since beginning, it was realised by the appropriate authority that if the possession of the final plots in question is handed over to the petitioners and the lands are developed as residential complex, that may cause security hazards to the jail complex and, therefore, with much reluctance, the petitioners were put to possession with an undertaking that they will not develop the lands for certain period. Since many years, it was under the consideration of the appropriate authority to vary the scheme. By varying the scheme, the petitioners have been allotted the land of final plot No.683 and, therefore, it cannot be said that the petitioners are deprived of their right to property. The allegations of mala fides, in our opinion, are vague and are not enough to dislodge the burden resting on the petitioners. Therefore, we do not find any merit in the submission of the learned counsel for the petitioners that the allegations of mala fide, if not denied, should be accepted and it should be held that the decision to vary the scheme is taken by reason of mala fide exercise of power on the part of the respondents.

25. It is contended by Mr. S.N. Shelat, learned Additional Advocate General, that the petition is premature. Still the town planing scheme is at the stage

of draft town planning scheme and the draft town planning scheme is to be approved and sanctioned by the State Government. It is also submitted that the petitioners would be heard by the Town Planning Officer before the scheme is sanctioned under Section 65 of the Act. We find much force in the submission of the learned Additional Advocate General. Before the Government sanctions the scheme, the Town Planning Officer, who is appointed under the Act, is bound to hear the petitioners and is bound to consider the representation of the petitioners. Before varying the scheme and making it another scheme in place of the former scheme, all the procedures prescribed under the Act and the Rules are to be followed. Therefore, the scheme, which is proposed to be varied, is at the primary and primitive stage and, therefore, in our opinion, the present petition is premature. The petitioners will get opportunity for placing their grievances and objections before the concerned authority, before the final scheme is sanctioned. Therefore, we are of the opinion that the petition is premature as the varied Town Planning Scheme is still at a primitive stage.

26. As a result of foregoing discussion, we do not find any substance in the contentions raised by the learned counsel for the petitioners.

27. In the result, this petition is rejected. Rule is discharged. There shall be no order as to costs.

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(swamy)